

SERVED: March 10, 1992

NTSB Order No. EA-3509

UNITED STATES OF AMERICA  
**NATIONAL TRANSPORTATION SAFETY BOARD**  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 25th day of February, 1992

BARRY LAMBERT HARRIS,  
Acting Administrator,  
Federal Aviation Administration,

Complainant,

SE-9786

v.

CHARLES J. ZITO,

Respondent.

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge John E. Faulk rendered on August 29, 1989, at the conclusion of an evidentiary hearing.<sup>1</sup> The law judge affirmed an order of the Administrator charging respondent with violations of sections 91.79(b) and 91.9 of the Federal Aviation Regulations ("FAR," 14 C.F.R. Part

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<sup>1</sup>An excerpt from the hearing transcript containing the initial decision is attached.

91).<sup>2</sup> The Administrator alleged that respondent acted carelessly by operating a hot air balloon over a congested area at an altitude of approximately 200 feet. The order called for the suspension of respondent's commercial pilot certificate for 30 days. On appeal, respondent contends that the law judge erred in deciding that the flight did not fall under the exception of FAR section 91.79 as "necessary for takeoff or landing."

After consideration of the briefs of the parties and the record below, the Board concludes that safety in air commerce or air transportation and the public interest require affirmation of the Administrator's order in its entirety.

Most of the facts alleged in the Administrator's complaint are undisputed. On September 16, 1987, respondent was pilot in command of N1991S, a Cameron Balloon V-77, on a passenger-carrying flight in Orange County, Orlando, Florida.

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<sup>2</sup>These sections of the FAR read in pertinent part:

"§ 91.79 Minimum safe altitudes: General.

Except where necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:

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(b) Over congested areas. Over any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of 1000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft."

"§ 91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

He conducted a pre-flight inspection of the equipment and found everything in working order. Respondent testified that the point of departure was an open field between 5 to 10 acres in size, adjacent to two major highways. Shortly after takeoff, at an altitude of approximately 200 feet, respondent heard a hissing sound coming from the pilot light valve. Fearful that this could indicate a propane leak, respondent decided to make a precautionary landing and immediately alerted the ground crew. He flew over a four lane highway for the purpose of landing in a nearby field. An FAA inspector and his wife saw the balloon as they were driving to work and became concerned at its low altitude over such a congested area.<sup>3</sup> Meanwhile, the respondent was trying to stop the leak by opening and closing the valve. Ultimately, he successfully eliminated the hissing noise. Respondent, perceiving the problem as remedied, decided to continue the flight and land the balloon at the destination originally planned.

In his appeal brief, respondent relies on Administrator v. Neil, 5 NTSB 732 (1985), as an example of an emergency justifying an otherwise impermissibly low flight. There, an

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<sup>3</sup>The Administrator's witnesses testified that the balloon flew directly over the Beeline Highway, near the intersection with Interstate Highway 4. The two highways run perpendicular to each other. Respondent contradicted this testimony, claiming instead that he traversed Highway 4. After assessing the evidence, the law judge determined that respondent floated over the Beeline Highway. In any event, both highways were busy with morning rush hour traffic.

unforeseeable emergency that arose during a balloon flight was sufficient to excuse respondent's choice of an otherwise inappropriate landing site. Thus, it was determined that respondent did not violate FAR sections 91.79(b) and 91.9. Neil differs from the instant case, however, because in Neil, there was no doubt that an emergency existed.<sup>4</sup> Rather, the question was whether the emergency resulted from foreseeable circumstances and could have been averted by the exercise of sound judgment before the flight. In the instant case, the law judge found that, based on all the evidence (including respondent's own testimony), an emergency situation, as referenced in FAR section 91.3, did not arise, and that if a valve malfunction necessitated a precautionary landing, respondent could and should have landed in the field from which he took off.<sup>5</sup>

Respondent also cites Administrator v. Schwontkowski, 5 NTSB 1186 (1986), where the Board found that a balloon's low flight over a congested area was "necessary for takeoff or landing" because there were no alternate sites available for the landing. The fact that the balloonist was practicing

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<sup>4</sup>There was not enough wind to propel the balloon to a more suitable location and the fuel supply was nearly exhausted.

<sup>5</sup>Section 91.3 of the FAR reads, in pertinent part:

"§ 91.3 Responsibility and authority of the pilot in command.  
\* \* \*

(b) In an in-flight emergency requiring immediate action, the pilot in command may deviate from any rule of this part to the extent required to meet that emergency."

emergency water landings at a time that "involved no endangerment or risk" to others was also a substantial consideration. Id. at 1188. Again, respondent rests his argument on a case that is inapposite to his own. He had an alternative landing site available, namely, the open field where the flight originated, the choice of which would have avoided low flight over a busy highway.<sup>6</sup>

In the case before us, the law judge evaluated the evidence and determined that an actual emergency did not exist. He also concluded that respondent, after discovering a possible problem, could have landed the balloon immediately in the open field where he first took off. Thus, respondent cannot avail himself of either the exception for emergencies illustrated in Neil, or the exception for low flight when necessary for takeoff or landing found controlling in Schwontkowski. Therefore, we find that the law judge's decision is legally correct and supported by a preponderance of the evidence.

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<sup>6</sup>See Administrator v. Rees, 4 NTSB 1323, (1984), where the Board stated that the appropriateness of the landing site may be assessed given the "overall context of the choices available to the pilot." Id. at 1324. See also Administrator v. Cory, NTSB Order No. EA-2767 (1988) (low approach over residential area to land in office parking lot not necessary for landing given another option available to respondent).

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is denied;
2. The Administrator's order and the initial decision are affirmed; and
3. The 30-day suspension of respondent's commercial pilot certificate shall begin 30 days after service of this order.<sup>7</sup>

COUGHLIN, Acting Chairman, LAUBER, KOLSTAD, HART, and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

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<sup>7</sup>For purposes of this opinion and order, the respondent must physically surrender his certificate to an appropriate representative of the Federal Aviation Administration, pursuant to FAR § 61.19(f).